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Life and Law in the Wake of Dobbs

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In overturning *Roe v. Wade*, *Dobbs* is rightly celebrated, both by legal conservatives and anyone who cares deeply about the unborn child. It is a victory wrought by decades of political and legal effort, devotion, and prayer by both groups. Yet, it has become increasingly apparent that the two groups do not *necessarily* overlap in their concerns, although of course many people belong devotedly to both groups. For the former, *Roe* was wrong because it represented an iconic and grotesque example of judicial overreach; for the latter, it was wrong because it precipitated the slaughter of tens of millions of unborn children. For the former the issue involved *how* constitutional questions should adjudicated; for the latter, the question was unavoidably about the *reality* and *truth* of the unborn child. This difference indicates that, in principle, the two reasons for disliking *Roe* could collide in their purposes. In fact, or so I will argue, they are in tension, at least from an analytical point of view.

To see my point, it is best to consider law's larger social purposes and meaning. Classical thinkers from Plato to Aquinas thought that law is irreducibly pedagogical in nature. This aspect of law has been downplayed or even rejected by modern thinkers (consider *Casey*'s notorious "mystery of life" passage), who tend to emphasize law's coercive element and its projection of power. Interestingly, however, law's pedagogical meaning has been reaffirmed in essence by legal anthropologists, such as Clifford Geertz, and more recently Fernanda Pirie, who argue that "law is 'part of a distinctive manner of imagining the real.'"[1]

From this latter perspective, *Roe* was wrong because it profoundly shaped our culture in ways both obvious and hidden. *Roe* did more than simply declare that abortion is a Constitutional right. It also served—like all law—as a kind of social pedagogy, as a way of "imagining the real."

Cardinal Ratzinger famously said that the unborn child is a model for all of us because it is the unborn child's radical dependency that characterizes the human condition; the unborn child makes explicit our relationship with God and those around us. If so, the denial of the unborn child's humanity *was always a substantial denial of our own humanity*. Everything is morally and *anthropologically* at stake in our legal and social disposition toward abortion.

Roe changed the way we would be permitted to think about ourselves and the things of our world. It cheapened human life and brought a fracture into the mother-child relationship. It entailed an entire worldview from which none of us could entirely withdraw.

Law is inevitably pedagogical. To say that the humanity or personhood of the unborn child is the sort of thing we ought to vote on is not neutral regarding what we inevitably think about the unborn child or indeed ourselves.

If *Roe* taught us all these things, it is not fully clear what *Dobbs* teaches us. Perhaps a look backward will help to clarify *Dobbs*' pedagogy.

Personhood as a Legal Fiction

Consider a 1972 case from the New York Court of Appeals called *Byrn v. N.Y. City Health*. Here the court, one year before *Roe*, rejected a lawsuit seeking to defend the unborn from new and very *permissive* abortion legislation. To the plaintiff's argument that the unborn should be considered persons, the court responded in part by stating that legal personhood and natural personhood were entirely different questions. That a fetus might be a person from the natural point of view had no bearing on whether the fetus was a person in legal terms. As the court put it,

> What is a legal person is for the law, including, of course, the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person. The process is, indeed, circular, because it is definitional.

To illustrate its point, the court argued that just as a corporation's status in law as a person does not make it a person in nature, so too, the court concluded, the fetus' possible status in nature as a person has no bearing on whether it is to be considered a person in law.

On the one hand, we could say that this last argument suffers from an obvious *non-sequitur*. Corporate personhood is a legal fiction: Just because *it* cannot be read back into nature does not mean that personhood in the more fundamental sense ought not to be rooted in the reality of natural personhood.

But more fundamentally, the court's ruling effectively severs the idea of personhood from anything outside law itself. As the court says, the question of legal personhood is circular, definitional. Law seems in *Byrn* to be completely separate from natural things, such as fetuses or embryos.

Notice the implication of *Byrn*'s separation of law from nature. The pre-*Roe Byrn* case certainly does not preclude the idea that a future NY legislature could declare the unborn to be persons after all, and on that basis outlaw abortion. So, it does not preclude the possibility that natural personhood and legal personhood could be made to coincide in the case of unborn children. However, it is important to note that this coincidence would be—from the court's or the constitutional point of view—entirely adventitious or accidental. Moreover, by its comparison of fetuses and embryos to corporations as artificial persons, the court suggests that if New York

law did, in fact, recognize the unborn child as a legal person, that recognition would, in effect, be the *equivalent* of a legal fiction, even if simultaneously the legislature were motivated by its recognition of the unborn as natural persons. In fact, if we follow out this logic a little further, *Byrn* suggests that *all* legal personhood is something like a legal fiction. In this sense, it would appear that—again from the court's or the constitutional point of view—legal personhood or non-personhood is arbitrary.

In a scathing dissent, one of the judges pointed to the extreme danger posed by this arbitrary treatment of personhood, drawing on its sad historical legacy. Yet, for our purposes, *Byrn* makes clear a tendency in law where it touches vital human questions. The tendency is to avoid discussion of the object at stake—personhood, marriage, family, and so forth—and instead treat it as an unknowable from within law and to then decide the question solely as a resolution of competing rights and interests.

Now, one reason I mention this 1972, pre-*Roe* case is that it represents the mirror image of *Roe*. The *Byrn* court was *upholding permissive* legislation. Whereas *Roe* was *overturning restrictive* legislation. And yet, similar patterns of thought are to be found in *Roe*.

Recall, in this connection, that *Roe* dealt with two arguments from Texas. *Roe first* tackled the argument that the unborn are persons under the 14th Amendment and that on that basis Texas had not only the authority, but also the duty, to protect them. In its conclusion that the fetus is not a "person" under the 14th Amendment (i.e., is not a "Constitutional person"), it looked to history (albeit a false one) and text (albeit not very intelligently, as John Hart Ely pointed out). Thus, its judgment, like that in *Byrn*, was simply a matter of positive law avoiding any attempt to ground the word "person" as found in the 14th Amendment in nature. In ignoring the question of whether the unborn child is a natural person, the Court was in essence concurring with *Byrn*'s conclusion that legal personhood has little to do with natural personhood.

Texas' second argument, however, was that, notwithstanding the question of 14th Amendment personhood, states have an interest in protecting human life. After all, states were prohibiting homicide long before the 14th Amendment. So, the states' authority or power to pass laws protecting human life does not *depend* on the 14th Amendment. It is to this second argument that *Roe* responded—famously or infamously—by saying that Texas may not impose its own theory of when "life" begins. Of course, in rejecting the ability of Texas to say when life begins, the Court does not mean life in the "biological" sense. It is clearly not saying, for example, that Texas may not recognize a difference between living fetuses and dead fetuses or human fetuses and non-human fetuses. In rejecting Texas' ability to say when human life begins, the Court is clearly referring to life in its properly human dignity or, dare we say, in its *natural* character as personal. In effect, then, Texas was referring to its authority to protect the *natural* and proper *humanity* of the unborn child, even if the Court was unwilling to grant the unborn child *Constitutional* personhood. In rejecting this second argument, the Court was rejecting the idea that Texas could grant the protections of legal personhood on the basis of this pertinent sense of life.

Like *Byrn*, but from the opposite point of view, the *Roe* Court effectively severed law from nature.

Now *Dobbs* overturned the *second* argument or prong of the *Roe* decision, having to do with the protection of human life more broadly, and therefore allows states to protect life in this pertinent sense. But it *did not* overturn the *first* argument, having to do with Constitutional personhood, as is emphasized by Justice Kavanaugh in his separate concurring opinion. And,

of course, *Dobbs* is perfectly compatible with *Byrn*, at least formally. So, unlike *Roe*, *Dobbs* enables legislatures to treat the unborn child as a natural person, and on that basis, a legal person. . . . Or does it? Are we not left, as in *Byrn*, with the idea that the question of *legal* personhood for the unborn child, whatever good words a legislature might put in for it, is severed from the question of *natural* personhood?

The Concurring Opinion

Recall Kavanaugh's concurring argument that, because the Constitution says nothing about abortion, it is "neutral" regarding the issue, and therefore the Supreme Court should also be, as he says several times, "scrupulously neutral." Just as there were those amici, he tells us, who would have the Court uphold *Roe*'s abortion right, there were others who would have the Court declare the fetus a person under the Constitution, thereby requiring the states to prohibit abortion. The *Dobbs* decision, he continues, rejects both positions. The Constitution, he tells us, is neither pro-choice nor pro-life. With *Dobbs*, he concludes, the Constitution's and the Court's original neutrality is restored.

The problem is that Kavanaugh is wrong. *Dobbs* is anything but neutral to abortion. In fact, it remains stubbornly "pro-choice," indeed, just as "pro-choice" as *Roe*. It has only moved that choice from the individual woman to the "people and their representatives," as the Justices repeatedly put it.

Nor is it even *possible* for the Court to be neutral on abortion. While it is true that the Constitution does not mention abortion, *it does mention life.* Kavanaugh's position, then, entails that the *life* of the *newborn* child and the *life* of the *unborn* child are treated in entirely different ways. From a Constitutional point of view, the life of the latter would not qualify as life. Otherwise, the issue could not be turned over to legislative bodies. But the Constitution does not itself require Kavanaugh's implicit distinction between the born and the unborn. To put this back into the terms of *Byrn*, Kavanaugh is simply clarifying in his separate opinion that whether a legislature recognizes the full humanity of the unborn child is purely a matter of positive law.

Now, given the aftermath of *Dobbs*, I should probably acknowledge that it was nearly impossible that the Court could have decided that the unborn child is a person under the Constitution. The political backlash would almost certainly have threatened the Court's institutional integrity. However, it is important to note that this recognition and the consequent decision that the Court did in fact render are essentially based on a political judgment, rather than a strictly legal one.

Of course, Kavanaugh is not arguing that the unborn child is *not* a natural person (perhaps he even believes that it is), but he is assuming, like the *Byrn* court, that whether it is or is not has no real bearing on its status as a *legal* person. If we follow the logic laid out in *Byrn*, doesn't *Dobbs*' permission to legislatures to grant legal personhood amount to the granting of permission to enact what, from the Constitutional point of view, amounts to a *legal fiction*? To put it differently, such an enactment remains, from the Constitutional point of view, a purely positivistic deposit of law—a judgment with far-reaching consequences, since Constitutional interpretation provides a basic structuring and overarching conceptual element for our republic.

Now, the problem is this. Law, as I said, is inevitably pedagogical. To say that the humanity or personhood of the unborn child is the sort of thing we ought to vote on is not neutral regarding what we inevitably think about the unborn child or indeed ourselves. It turns it into a "policy"

question. And yet, if the *Byrn* court or the *Dobbs* Court tell us, in effect, that the unborn are not fully human or personal from the legal point of view, we inevitably begin to think they are also not from the natural point of view. And this is because our views of things depend on our actions and the actions of those around us, and these are shaped by law. It is simply not possible to separate law from its pedagogical effects.

Hence, this inability of courts or legal rationality to engage *real things* or the *nature* of things is *paradoxical*. The different treatment of born and unborn life amounts to a silent social judgment about what constitutes those very things. The judgment is that the life of the unborn child is not life in the pertinent sense, as fully *human* or *personal* life. So, the positivistic refusal to look at the nature of the unborn child paradoxically results in an implicit judgment about the *nature* of the unborn child.

Of course, the state laws that may be passed protecting life are themselves pedagogical, but so is the Constitutional law generated by the Court. And this Constitutional law then saddles state legislation, however excellent it may be, with the mark of arbitrariness.[2]

The Majority Decision

Now, unlike Kavanaugh's, Justice Alito's opinion for the court does not use the language of "neutrality," even if the basic judgment is ingredient in the result. Yet, the decision is ambiguous in important, perhaps fruitful, ways.

First, there is an architectonic ambiguity, which works like a fault line through the entire decision and is implicit in Kavanaugh's concurrence as well. The Court's argument is essentially "originalist." The question is whether "liberty" in the 14th Amendment fairly includes a right to abortion. And the answer is "no," when we carefully consider text and history, as Alito did so admirably. Yet this "originalist" argument proves too much.

An entire edifice of Supreme Court decisions, involving social/human issues, such as contraception, gay marriage, and sodomy, would seem to collapse like a house of cards if *Dobbs*' standards were applied to the whole. Culturally, to overturn all of these is a bridge too far, however much we might wish for it.

Alito's response is that abortion is different from all those others because it involves *life*. Yet, the introduction of life as the basis for distinguishing abortion from the other cases seems adventitious, a sort of *deus ex machina* in relation to the main originalist argument. Is the criterion "history and text *plus* life," as though the originalist argument alone is not enough? But if so, why life and not the other important human issues taken up in the other cases? And how is the originalist argument augmented by the addition of life? Is it just that the question of life is very important? But arguably, so are the others.

The problem is that originalism is an interpretive method; it is about *how* judges should decide cases and interpret law; in this sense, it is essentially formal and procedural in nature, rather than substantive. The appeal to life, on the other hand, is an appeal to *substance*; it is not related to how judges should decide cases or interpret law in general; it is about *what* a law governs: it is about the thing itself.

Sherif Girgis of Notre Dame has proposed that the Court's appeal to life is based on the idea that the issues in all the other cases are self-regarding, whereas abortion involves an "other." He proposes that the Court has incorporated something like Mill's "harm principle." But, while Girgis' proposal, as usual, is both helpful and suggestive, doesn't it simply *postpone* the

question? Is it the originalist argument *plus* the application of Mill's harm principle, then? The originalist argument is not enough on its own? Moreover, the harm principle only applies if there really is an "other," something *Roe* denied and to which the *Dobbs* Court certainly does not commit.

And yet, it is interesting that Alito characterizes the competing interests involved in abortion as those of the mother to autonomy and the fetus *to life*, again suggesting that the fetus is a subject of rights. *Roe* and *Casey* (and, interestingly, Justice Kavanaugh), on the other hand, carefully describe the competition of interests as that between the woman and *the state*, rather than the woman and the fetus.

If there is an ambiguity here, then I think it is this. Alito's opinion for the Court has in effect put two rational principles together that seem unrelated, one having to do with proper legal interpretation and one having to do with a subject matter of state law. In doing so, he seems to gesture, perhaps vaguely, toward some legally cognizable status, beyond that available in the *Byrn*-style of pure legal formalism.

Independence?

The second ambiguity is even more enlightening. It is Alito's very interesting critique of *Roe*'s viability standard, as essentially arbitrary. The standard, he complains, depended on factors external to the developing life in the womb.

The question of arbitrariness was also a major topic at oral argument. There, the two attorneys opposing Mississippi's law insisted that the viability standard is "*principled*" because it is "*reasonable*." It balances women's and states' interests. It gives the mother enough time to decide to have an abortion if she so chooses. But it also allows the state to exercise its interest in the "potential life" of the fetus as it becomes more developed. When pressed, the Solicitor General argued that the viability standard was reasonable because it represented a certain stage of fetal "*independence*" or "*separateness*" from the mother.

These considerations spawned what I thought was an especially interesting line of inquiry on the part of Justice Alito. To say that it strikes the right balance fails to provide a principle for saying *why* it is the right balance or *why* the Court should be balancing at all when it comes to such weighty matters. Alito seemed to grant the relevance of "independence" or "separateness" to the question of arbitrariness. But he also pointed out that the mother's "interest" in getting an abortion is the same immediately after viability as it was before, and that the "interest" of the fetus in "having a life" is the same before as after viability: so nothing seems to change in this regard at viability.

Recapitulating this colloquy, the *Dobbs* decision dismissed *Roe*'s appeal to viability on the basis of its arbitrariness. The viability standard, Alito complains, seems to depend more on the state and availability of medical technology *than on the fetus itself*. It does not seem very satisfactory to think that the status of the unborn child, and the states' interest in protecting its life, should hinge on the changing and variable conditions of medicine and medical technology. If such a consequential line is to be drawn regarding how we are to understand and treat the fetus, shouldn't that line be based on something *intrinsic* to the fetus itself?

The Solicitor General, on the other hand, took a principled distinction or dividing line to depend, not on the fetus itself, not on the nature of the thing itself, but, like the *Byrn* court, on an external weighing of interests, rights, and authorities.

Hence, by asking whether a principle can be found intrinsic to the fetus itself, Alito seemed to seek some anchor, some reality outside of law, and indeed outside the mere mediation or balancing of "interests" or the circularity of the purely positivistic legal definition that we find in *Byrn*.

Perhaps it will help to ask ourselves precisely what is meant by "independence" or "separateness." There are two possible senses.

First, independence or separateness might be understood in an "extrinsic" sense where personal existence develops and increases in relationships that are only *voluntary* in nature. By implication, if my survival or continued existence *requires* (nonvoluntarily) the cooperation or help of others, I have a less-than-full personal existence. I am less independent.

But there is a second sense of independence or separateness, which might be understood in an "intrinsic" sense. Perhaps this is what Alito is groping for. This sense of independence or separateness would refer to the wholeness and trajectory of the personal human organism, the arc of life, that is possessed by every individual member of the species. Here independence would simply point to the fact that the fetus, or the embryo or zygote, is a *whole* and not simply a part of another organism, such as the mother. It would mean possessing one's nature as an individual organism, an individual instance of a nature. But when we are talking about *human* nature in the pertinent sense, is this not also what we mean by "person," with its capacities for freedom, reason, and love?

In this sense of independence, though, dependency on the care and essentially non-voluntary relations of the family does not stand as a limitation of "independence" or "separateness." Nor do they stand for a diminution of personal dignity.

Nor does the fact that none of us is truly independent in the first sense diminish our personal dignity. None of us would last long without the social context in which we live, since we certainly cannot provide everything needed for even physical life, let alone a *good* life, as Aristotle points out. (It is interesting in this regard that C.S. Lewis in *The Great Divorce* sees hell as an ever-increasing distance between the damned.)

Now the Solicitor General presupposed the first kind of "independence." Presumably Alito also has the first sense in mind, too, when he speaks of the mother's and the child's interests as essentially outside each other and in competition. And yet, his search for a principle intrinsic to the fetus generates a certain ambiguity in this regard, perhaps even one that suggests a desire to surmount the tendency in this area of law to abstract itself from real things. If so, then Alito, however unconsciously, has echoed Ratzinger's point about the unborn child's iconic representation of the essential human condition.

Whatever we may think of these final points, Dobbs clearly expresses a hope that the decision will end the Supreme Court's adventures in the vexed debate over abortion. And yet, at least on Kavanaugh's reading, the decision has perpetuated the Court's ambivalence regarding the status of the unborn child. It is an ambivalence that continues to obscure law's foundation in the real things about which it must nevertheless pronounce judgment. Here we see the tension inherent between the objections to *Roe* and its progeny offered by legal conservatives and those who simply want to protect life. This obscurity is the fruit of legal conservativism's diffidence about the unborn child, preferring the linguistic circle described by the *Byrn* court. And yet, this reticence, as we have seen, cannot help but to bear a pedagogy about the things it claims not to address, such as life in the womb. It unavoidably is a way of "imagining the real," in this case as the fractured relationship between the mother and child and a fictional idea of personhood as an extrinsic separation or independence from others. And in this imagining, it

perpetuates *Roe*'s assault on that essential element of our humanity to which Ratzinger had tried to draw our attention.

[1] Fernanda Pirie, *The Anthropology of Law* (Oxford University Press, 2013), 57, quoting Geertz, *Local Knowledge* (New York: Basic Books, 1983), 173.

[2] John Finnis and Robert George have argued on *originalist* grounds that the fetus' life should be considered life under the 14th Amendment. This is a noble effort to get at the problem on positivism's own terms. But shouldn't Constitutional rights be rooted in *real things*, such as what men, women, children, marriage, and, yes, the unborn child really are?